(1982) 02 CAL CK 0021

Calcutta High Court

Case No: S.A. No. 798 of 1978

Sankari Prasad Mukherji and Others		APPELLANT
	Vs	
Chandra Sekhar Mukherji and Another		RESPONDENT

Date of Decision: Feb. 17, 1982

Citation: 86 CWN 693

Hon'ble Judges: Amitabha Dutta, J

Bench: Single Bench

Advocate: Pramatha Chandra Roy and Ranjit Kumar Roy, for the Appellant;Dilip Kumar Banerjee, for the Respondent

Final Decision: Dismissed

Judgement

Amitabha Dutta, J.

This is an appeal by the defendants from a decree of reversal in a suit for declaration that the properties mentioned in "ka" and "ga" schedules to the plaint are absolute debutter properties of the deity Shree Shree Chandrachur Shiv Thakur and that the plaintiffs have joint shebaiti right with the defendants in such properties and tor permanent injunction restraining the defendants from interfering with the plaintiffs joint possession thereof.

"Briefly stated the plaintiff"s case is this. One Kamini Dasi of a barbar family of Talalpur having 2/3rd share in ka" and "kha" schedule properties absolutely dedicated her state to the deity Shree Shree Chandrachur Shiv Thakur by a registered deed of Arpannama dated 29th Magh 1311 B.S. and appointed Purna Chandra Banerji of Memari as shebait of the deity to perform sheba puja out of the usufruct of such property. Rakhal Chandra Nai who had the remaining 1/3rd share in such properties also made an absolute dedication of his share in favour of the said deity orally and entrusted the sheba puja of the deity to the same shebait Puma while exercising his shebaiti right and performing his spiritual duties died leaving his only son Satya Charan who inherited shebaiti right and performed the sheba puja of the deity ml he became old. Thereafter, as ha laced great

difficulties in performing the sheba puja of the deity daily alter coming to Tatalpur from his village Memari he brought his brother-in-law Nagendra Mukhopadhya from his village Kuiingram to Tatalpur and entrusted to him the duties of performing the Sheba puja of the deities. Subsequently being satisfied with his performance Satya Charan transferred his shebaiti right in "ka" and kha" schedule properties to Nagendra by a registered deed of transfer dated 12th Bhadra 1321 B S with the stipulation that he and his heirs and successors in interest would perform the sheba puja of the deity from generation to generation out of the usufruct of such property Nagendra functioned as shebait of the deity for over 50 years. But he transferred portions of "ka" "kha" shedule properties without legal necessity to different persons treating them as his secular properties Nagendra thereafter, orally dedicated his own property mentioned in "ga" schedule to the plaint to the same deity absolutely and applied income from such property to the sheba puja of the deity subsequently by a registered document dated 5th Kartick 1374 B S. (23.10. 1967) Nagendra purported to nominate the defendants who are two out of his four sons as shebait of the deity in respect of "ga" schedule property excluding the plaintiffs who are his other to sons. But Nagendra remained shebait of the deity till his death which took place in 1377 B. S. Thereafter, the plaintiff and the defendants jointly possessed the "ka" and "ga" schedule properties and performed sheba puja of the deity as shebaits but since Ashar 1380 B.S. the defendants taking advantage of the aforesaid document dated 23. 10. 67 an erroneous entry in the C.S. and R S. records threatened to interfere with the plaintiffs" joint possession of the disputed "ka" and "ga" schedule properties. Hence the suit.

2 The defendants In their written statement have denied the material averments made in the plaint. The substance of the case is that Purna Chandra Banerji was shebait of Shree Shree Mahadeb Shiv Thakur of the barbar family of Tatalpur who dedicated "ka" and "kha" schedule properties for performance of sheba puja of the said daity, which was installed in the house of Kamini Dasi that the said house collapsed and the idol got buried that after the death of Puma his son Satya Charan in order to save such properties from being made khas by the landlord created the sham document dated 12th Bhadra 1321 B.S. purporting to declare the "ka" and "kha" schedule pro parties as debutter properties of Shree Shree Chandrachur Shiv Thakur and transferred the shebaiti right in favour of Nagendra Thereafter Nagendra possessed such properties and acquired title thereto by adverse possession. Nagendra"s father Akshoy had come to Tatalpur and acquired "ga" schedule property which was inherited by Nagendra who consecrated the deity Shree Shree Chandrachur Shiv Thakur and installed it in a temple constructed by him on Plot No. 164. Nagendra made a partial dedication of "ga" schedule property in favour of the said deity which is different from the deity Shree Shree Mahadeb Shiv Thakur of the barbar family and became its founder shebait. He legally nominated the defendants as shebaits of the delty in respect of "ga" schedule property and the plaintiffs having no shebait right in the disputed properties, the suit is liable to be dismissed.

3. The trial court has held that the disputed properties are the absolute debutter properties of Shree Shree Chandrachur Shiv Thakur established by the barbar family of Tatalpur and that Purna Chandra Banerji was shebait of the daity and was succeeded by his only son Satya Charan. But according to the learned Munsif Satya Charan had no right to transfer the shebaiti right to Nagendra Mukhopadhya to whom both parties claimed such right, in that view the learned Munsif has dismissed the suit In appeal the learned Subordinate Judge has held that the transfer to the shebaiti right by Satya Charan to Nagendra for pressing necessity and in the interest of deity is valid. The first appellate court has found that the plaintiffs'' case has been sufficiently established and that the defendants have failed to prove their allegations. So, it has reversed the decision or the trial court and decreed the suit.

4. It has been submitted on behalf of the appellants before this Court that the first appeliate court has erred in holding that ''ka'' and ''kha'' schedule properties are absolute debutter properties in the face of the Arpannama dated 29th Magh 1311 B.S. (Ext. ''A'') by Kamini Dasi in favour of Purna Chandra Banerji in respect of her 1/3rd share inherited from her husband and the deed of gift dated 29th Magh 1312 B.S. (Ext V) in favour of the same person in respect of 1/3rd share which she had purchased from her husband''s elder brother. But it is difficult to accept the submissions. The recital in exhibit ''A'' shows that she made the property ''Nibyuirha'' debutter i.e. absolute debutter in favour of her husband''s ancestral family deity Shree Shree Iswar Mahadeb Shiv Thakur by making the grant to Purna Chandra Banerji as shebait of the deity or its human agent A Hindu widow has unlimited power of alienation for obligatory religious purposes of providing for the deity established by her husband''s family The subsequent dead of gift (Ext ''A-1'') was made in favour of Purna Chandra Banerji on the express conditions that he would reside at village Tatalpur to perform the daily sheba puja of the said deity as there was no resident Brahmin in that village and it was stipulated that the donee would lose the property if the condition was not fulfiled. Thus there was implied dedication as the intention of the donor was that the property was to be held by the shebait for the benefit of the deity by way of regular performance of sheba puja. Her intention to divest herself completely of the property dedicated to the deity is manifest from the recitals in the documents and also from the subsequent acts and conduct of the donor, there being no evidence to show that she ever dealt with or enjoyed the dedicated property for her own purposes.

5. It is not disputed that the other co-sharer of Kamini Dasi in respect of 1/3rd share orally dedicated his share in ''ka'' and ''kha'' schedule properties absolutely in favour of the said deity. There is evidence that Purna as shebait performed sheba puja of the deity during his life time from the usufruct of such properties treating them as absolute debutter and was succeeded by his only son Satya Charan who did the same. This fact that after Satya Charan, Nagendra dealt with portions of such properties as secular properties does not take away their character as absolute debutter. A mere abuse of trust by a trustee for the time being cannot make a real endowment unreal or illusory or affect its validity. In my

view, both the courts below have rightly held in accordance with the settled law on this point that "ka" and "kha" schedule properties are absolute debutter properties.

6. The courts below have after due consideration of the evidence in this suit concurrently found that Mahadeb Shiv Thakur and Chandrachur Shiv Thakur are the same deity established by the barbar family of Tatalpur and it was installed in the temple constructed on Plot No. 164, disbelieving the defence case that Chandrachur Shiv Thakur is a separate deity founded by Nagendra after the deity of the barbar"s of Tatalpur got buried when Kamini Dasi"s house where it was installed collapsed. In this connection, what is important is the establishment of the idol and not the construction of the temple building where it installed. In my opinion, there is no reason to differ from the aforesatid concurrent findings of the two courts.

7. There is evidence accepted by the first appellate court that Satya Charan who is the only son of the She-bait Purna became shebait of the deity, and was a resident of village Memari found it extremely difficult in his old age to come daily to Tatalpur from Memari to perform the sheba puja of the deity and in view of pressing necessity to make a proper arrangement for performance of the sheba puja regularly and in the interest of rendering daily services and worship to the deity brought his brother-in-law Nagendra Mukhopadhya to Tatalpur from Kulingram to perform those deities and after being satisfied with his performance transferred the shebaiti right in "ka" and "kha" schedule properties to Nagendra by the registered document dated 12th Bhadra 1321 B.S. (Ext. 2). The learned Subordinate Judge has held differing from the trial court that the transfer is valid. In my view, the doctrine of alienation of shebaiti right comprising both the temporalities of the idol and the spiritual rights and duties of the shebait in the interest of the idol can be supported in view of the Bench decision of this Court in the case of Nirmal Chandra Banerji vs. Jyoti Prasad 42 CWN 1138 and I therefore, hold that the learned Subordinate Judge is right in his view that the alienation of the shebaiti right by Satya Charan to Nagendra is valid.

8. It is not disputed that Nagendra, father of both the plaintiffs and the defendants was shebait of the deity Shree Shree Chandrachur Shiv Thakur for a period of over 50 years till his death in 1377 B.S. or 1970. He transferred portions of "ka" and "kha" schedule properties to different persons (including the plaintiff No. 2 and the defendant Nos. 1 and 2) in 1949, 1954 and 1967 treating them as his secular properties. There is evidence that after such abuse of trust Nagendra made an oral and absolute dedication of his own "ga" schedule property to the deity and performed the sheba puja of the deity out of the usufruct of such property. Thereafter, on 23.10.1967 he nominated the defendants as shebaits of the deity by a registered document (Ext. "C") in respect of "ga" schedule property. The plaintiffs have challenged the validity of such nomination and the learned Subordinate Judge upheld their contention has held that such nomination is contrary to law as Nagendra was not the founder and so the plaintiffs have joint shebaiti right with the defendants in the disputed properties. It has been urged on behalf of the appellants that the learned subordinate Judge has erred in law as Nagendra should be regarded as the

founder in respect of "ga" schedule property dedicated by him to deity and his nomination of the defendants as shebaits in respect of such property is valid in the eye of law. But in my view, this submission cannot prevail as after the foundation of the deity additional endowments cannot alter the line of succession laid down by the founder under the ordinary rules of Hindu Law unless the appointment of a new line of shebaits is made a condition attached to the gift and the gift with such condition is accepted by the family deity expressing its will through the members of the founder"s family both male and female. This view finds support in the Bench decision of Rankin C J. and C. C. Ghosh J in the case of Ashutosh Seal vs. Benode Behary 34 CWN 177. Where an additional gift is made by the donor without any condition he does not become a joint founder and his gift is treated as an accretion to the existing endowment (see Ananda Chandra vs. Brojo Lal 36 CLJ 356. In the present case there is no evidence that Nagendra made the aditional gift of "ga" schedule property to the deity with a condition that the defendants would be the sheba t of such property. So after Nagendra"s death the shebaitship would devolve on his four sons that is to say both the plaintiffs and the defendants under the ordinary rules of succession of Hindu Law. I, therefore, find that the learned Subordinate Judge has correctly held that the plaintiffs have joint shebaiti right with the defendants in the deputed "ka" and "ga" schedule properties which are absolute debutter properties of the deity Shree Shree Chandrachur Shiv Thakur of Tatalpur.

9. No other point has been raised in this appeal. I hold that the first appellate court has rightly decreed the suit end this appeal must fail. The appeal is dismissed. There will be no order as to costs.